THE EXERCISE OF PREROGATIVE POWERS AND THEIR POLITICAL OUTCOME

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I INTRODUCTION

The exercise of prerogative powers has influenced political debate and, in many instances, changed the course of political developments. In the last 50 years, the exercise of these prerogative powers on the national stage may be highlighted by what occurred in Australia in 1975; in the Pacific Island of Fiji in 1979; in the United Kingdom in two recent landmark Brexit cases; and in the United States under President Trump. In the instance of Trump, the exercise of prerogative powers under its Constitution was followed by an unsuccessful attempt by Congress to have him impeached. Aside from the United States, each of the countries at the relevant time were Constitutional monarchies exercising prerogative powers. Even those powers recently exercised by President Trump were derived from the powers of George III, the monarch in power in England at the time of the creation of the US Constitution.

II THE CONSTITUTIONAL CRISIS INVOLVING SIR JOHN KERR

The best-known exercise of the prerogative in Australia was the dismissal of Prime Minister Gough Whitlam's government in 1975 by the Governor General, Sir John Kerr, applying the prerogative powers the Governor General had under the Australian Federal Constitution. The Chief Justice, Sir Garfield Barwick, took the unusual step of proffering advice at the Governor General's request and, subsequently, wrote about it in *"Sir John Did His Duty"*[1] *and in his autobiography "A Radical Tory: Garfield Barwick's Reflections and Recollections*"[2]. Under the Governor's constitutional prerogative powers, he or she may summon, adjourn and dissolve Parliament. Typically, this is done on the advice of the Prime Minister of the day.

A *Approval of Budget Legislation*

As Sir Garfield explains, Parliament controls the finances of the country and all revenues received are paid into a consolidated fund that cannot be drawn upon without Parliamentary authority. Each year, Parliament approves a budget submitted by the Ministry that specifies what receipts there will be, both by way of taxes and charges and by way of borrowings. If Parliament will not approve the annual budget, the Ministry

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(1983), Serendip Publications, Sydney, [1] – [129].

[2] (1995), Federation Press, 281-300.

must either resign or ask for the House of Representatives to be dissolved so that there will be a general election. The resignation of the Ministry occurs once Parliament rejects its budget and this is to avoid embarrassment to the Crown itself in having to dismiss the Ministry.[3]

The electorate chooses Parliament, although the Ministry to form the Executive government is not elected but appointed by the Governor General. The appointees are to hold office during the Governor General's pleasure. The Ministry remains in office if it retains the confidence of Parliament. The Governor General's power to choose and dismiss the Ministry is exercised in accordance with Parliamentary wishes. If Parliament does not support the Ministry, the Ministry must go to the people for their endorsement. In other words, the Governor General's function is to see that Parliamentary wishes are met. If the Parliament will not support the Ministry, then dissolution by the Governor General is followed by the people electing a new Ministry. If there is a vote of no confidence by Parliament or a failure to pass a legislative proposal vital to the execution of a major policy, which would include a failure to carry the annual budget, then the Ministry is expected to resign and the Governor General is advised to dissolve the House of Representatives and call an election.[4]

B *The Senate*

Sir Garfield saw the position as one where, in 1975, two States that filled casual vacancies in the Senate did not support the Ministry and, because of this, the control of the Senate passed out of the hands of the Ministry.[5] In order for the Appropriation Bills setting out the budget to be passed into law, the concurrence of the Senate as well as the House of Representatives was required. The Senate, now in the control of the Opposition, deferred consideration of the Appropriation Bills and stated that the Prime Minister and his Government no longer had the trust and confidence of the Australian people. This was a resolution passed by the Senate, which Sir Garfield maintained attracted the operation of s57 of the Constitution. That section provides that if the Senate rejects or fails to pass a proposed law that had been passed by the House or, alternatively, it is amended so the House will not agree. Subsequently, after an interval of three months, the House of Representatives, again, passes a proposed law that is then rejected by the Senate. Correspondingly, the Governor General may dissolve the Senate and the House simultaneously.[6]

The Appropriation Bills were presented to the Senate on three occasions in 1975 and, on each occasion, the Senate did not give its approval. Sir Garfield Barwick took the view whether it was proper for the Senate to have used its legislative power to block supply; this action could not affect the legal validity of the action taken. Its failure to pass the bills was an exercise of the Senate's legislative power.[7]

Sir Garfield maintains that some of the misunderstanding in 1975 came from a

[3] Ibid [282]-[283].
[4] Ibid [283].
[5] Ibid [286].
[6] Ibid [283].
[7] Ibid [286]-[287].

failure to appreciate the effect that several elements of our Constitution differ from the Westminster elements. This is because of the dominance of the House of Commons in the Westminster system and its claim to be a popular House. The House of Lords, until recently, was composed of hereditary peers who were not elected or representative. This is a feature has no real counterpart in Australia, where the Senate is also an elected representative body. This failure to appreciate that the Senate is a representative body produced the outcry that the Senate could bring down what was said to be an *"elected Government"*. He maintains this was a misnomer, for the Ministry is appointed with no fixed term and only during the Governor General's pleasure. This conveys that it may govern only for so long as it has the approval of both Houses and not merely the House of Representatives alone.[8]

When the budget was not passed for the third time in 1975, Sir Garfield said the danger loomed that there would be no funds to carry on Government. By 11 November, the private banks had indicated their unwillingness to fund the Government and the political leaders knew that because of logistic constraints – namely, due to the fact that a month must elapse between the calling of an election and the election itself, there was a danger that supply could expire before a new Ministry could be formed.[9]

Although, as a general rule, the initiative to set in train dissolution is taken by the Ministry, the Whitlam Government did not intend to do this but to *"tough it out"*. The Government of the day may have intended pressure to be put on Senators to defect from the opposition and vote to grant supply or, alternatively, if that did not work, to obtain private funding. Sir Garfield maintains the urgency of the need to provide funds to carry on government made for a waiting time of more than three months, envisaged by s57 of the Constitution inappropriate.[10]

Sir Garfield also felt obliged to address other arguments raised at the time: that Sir John Kerr, on November 11, ought not to have dismissed the Ministry and thereby allowed a general election to ensue. For example, Kerr had dismissed the Ministry without giving prior notice to Mr Whitlam of his intention to do so. Sir Garfield says had Kerr done so, it would then have put the Queen in an invidious position: particularly, given the possibility that Mr Whitlam may have then sought to have the Governor General dismissed before he was himself dismissed by the Governor General.[11] The debate about the 'correctness' of the moral and legal stance taken by Sir John highlights the significance and impact the exercise of prerogative powers under the constitution may have at critical moments in a nation's history. In this case, it brought about an election which saw the Coalition replace the Labour Party in government.

III CONSTITUTIONAL ISSUES THAT AROSE IN FIJI

Just two years after Sir John Kerr acted on the advice received from Sir Garfield, Fiji had a constitutional crisis that also involved its Governor General. Fijian Governor General, Ratu Sir George Cakobau, who received advice from his Chief Justice Sir

[8] Ibid [288]-[289].
[9] Ibid [293].
[10] Ibid [293].
[11] Ibid [298].

Clifford Grant, was later to become Chief Magistrate in Western Australia. The issue on that occasion was to advise the Governor General as to whom the Governor General should ask under the Fiji Constitution to form the Government, since neither of the major parties were able to command an outright majority following a closely fought election. As with the case of Sir John Kerr, it was not open to the Governor General to take advice from the law officers of the Ministry since to take advice from Government law officers would invite accusations of partiality and therefore the Chief Justice was drawn into the political arena.

A *The Assignment of Executive Control of Independent Governmental Offices*

The more usual position, as Sir Garfield points out, is for a Governor General to act on the advice of the Ministry when giving Royal Assent to Parliamentary legislation or issuing executive directives. In such cases, all acts of Government are done by the Governor General in council. The Governor General acts on the advice of a member of Government who, being a Member of Parliament, is responsible for the advice given and the action taken."[12]

This occurred in Fiji in 1981 when the Fijian Governor General, acting on the advice of the Prime Minister, issued a directive that assigned responsibility for various independent offices under the Constitution to the administrative control of the Fiji Attorney General. The offices were the judiciary, the Director of Public Prosecution's office, the Auditor General's office and various other offices. These included the Public Service Commission and the Judicial Legal Services Commission, which had independent status under the Fiji Constitution. The assignment of control to a politically appointed Attorney General followed a prosecution by the Fijian DPP which had uncovered corruption in the Fijian cabinet. The Governor General's direction was challenged by the Fiji Director of Public Prosecutions and this direction was held unconstitutional by the Fijian Court of Appeal. The Ministry then appealed to the Privy Council who set aside the orders of the lower Courts.

The Privy Council, who traditionally deliver an unanimous opinion for Her Majesty's adoption, considered on a construction of the relevant Constitutional provisions that the directive was lawful. Although, the Court acknowledged such administrative control might give rise to abuse it was not to be presumed that this would occur.

The assignment of responsibility did not purport to control the substantive functions of those offices, but only their administrative control. Administrative control was not constitutionally protected and, with loss of administrative control for their independent offices, the door to exert political influence by an unscrupulous government was left ajar. Several successive coups in Fiji, which began seven years later, might well have been attributable in part to the fact that these law enforcement entities had been much weakened by their loss of administrative control now vested in a politically appointed Attorney General.[13]

The actions of the Australian Governor General in 1975 and the Fijian Governor

[12] Ibid [282].

[13] *The Attorney General of Fiji v The Director of Public Prosecutions (Privy Council Appeal No. 37 of 1981)* reported in [1982] UKPC 34.

General in 1979 were exercises of the Royal prerogative by the Queen's representative following advice by their respective Chief Justices in accordance with their interpretation of the provisions of the applicable Constitutions.

On the other hand, the Privy Council case in which the Fiji Director of Public Prosecutions unsuccessfully challenged the executive direction assigning responsibility to the Attorney General was an attempt to distinguish the independent offices under the Constitution from the discretionary power exercisable by Ministers under the Royal Prerogative. Professor Dicey defined "Prerogative Powers" as "the remaining portion of the Crown's original authority, and it is therefore… the name given to the residue of discretionary powers left at any moment in the hands of the Crown, whether such powers be in fact exercised by the King himself or his Ministers."[14]

IV THE FIRST BREXIT CASE

Neither the removal of Whitlam's government nor the appointment of a new Fijian Government under the Royal Prerogative gave rise to litigation. Indeed, had it done so, the respective Chief Justices would undoubtedly have had to exclude themselves from sitting. However, the 2016 referendum in the United Kingdom, which voted to leave the European Union, did result in two major cases which define the scope of the Royal Prerogative.

In January 1973, the United Kingdom (UK) became a member of European Economic Community (the EEC). In December 2015, the UK Parliament passed the *European Union Referendum Act* and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the European Union (the EU). Thereafter, Ministers of the Crown announced that they would bring UK membership of the European Union to an end, which raised the question whether a formal notice of withdrawal could lawfully be done by Ministers. The preceding was pursuant to prerogative powers, without prior legislation being passed in both Houses of Parliament and assented to by the Queen.

The Government (the Ministers) argued that withdrawal from the EU could take place in the exercise of prerogative powers and did not require prior legislation to be passed for this to occur. A challenge was raised by two applicants, Gina Miller and Deir Dos Santos against the Secretary of State contending Parliamentary legislative approval was necessary. The proceedings were heard before the Chief Justice, the Master of the Rolls, and Lord Justice of Appeal who ruled against the Secretary of State[15]. The Ministers took the matter on appeal to the Supreme Court, who sat the full bench of eleven Judges and, who in January 2017, by a majority of eight Judges to three found that the Ministers' appeal should be dismissed[16]. The case reviewed existing prerogative powers and the relationship between domestic law and international legislation.

[14] House of Commons, *Public Administration*, 4th Report.

[15] *(R) (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

[16] *(R) on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.

A *The EEC Treaties and UK Statute law*

The Ministers' case was based on the existence of well-established prerogative powers of the Crown to enter and to withdraw from treaties. It was argued that Ministers are entitled to exercise prerogative powers in relation to withdrawal. In January 1972, Ministers signed a Treaty of Accession that provided that the United Kingdom would become a member of the EEC. Accordingly, it would be bound by the 1957 Treaty of Rome, which was the main treaty in relation to the EEC. A bill was then laid before Parliament, which received the royal assent when it became the *European Communities Act 1972* (the 1972 Act) and the following day ratified the Accession Treaty on behalf of the United Kingdom. Section 2(1) of the 1972 Act provided that:

> *"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly…."*.

Section 2(2) of the 1972 Act authorised and designated Ministers to make regulations for the purpose of implementing EEC (now EU) community obligations.

In the past 40 years, over 20 treaties relating to the European Union were signed on behalf of Member States and, in the case of the United Kingdom, by Ministers. One of those treaties being the Treaty of Lisbon inserted Article 50, which provided that *"any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements".* A Member State that decides to do so, notifies the European Council of its intention which will result in the European Council negotiating and concluding an agreement setting out the arrangements for withdrawal. The European Treaty shall cease to apply to the State from the date of entry into force of the withdrawal agreement, or failing that, two years after notification unless the European Council unanimously agrees in conjunction with the Member State to extend that period.

B *International Law and the 1972 Act*

The general rule is that power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the Courts. This principle rests on the so-called dualist theory, which is that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between Sovereign States have effect in international law and are not governed by the domestic law of any State. The second proposition is that although they are binding on the United Kingdom in international law, treaties are not part of the UK law and give rise to no legal rights or obligations in domestic law[17].

The 1972 Act authorised a dynamic process. Under this authorisation, without further primary legislation or domestic legislation, the EU Law took precedence over all

[17] *(R) (on the application of Miller & another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5 [55].

domestic sources of UK Law including statutes. However, consistent with the principle of Parliamentary sovereignty, this *"unprecedented state of affairs"* only lasts so long as Parliament wishes, and the 1972 Act could be repealed like any other statute[18].

EU Law may take effect as part of the law of the United Kingdom in three ways. Firstly, the EU Treaties themselves are directly applicable by virtue of section 2(1) and some of the provisions of those treaties create rights and duties which are directly applicable in the sense that they are enforceable in UK Courts. Secondly, section 2(1) provides that the EU treaties are to have direct effect in the United Kingdom without need for further domestic legislation. Thirdly, section 2(2) authorises the implementation of EU Law by delegated legislation. This applies mainly to EU directives which are required to be transposed into National Law[19].

The majority considered that although the 1972 Act gives effect to EU Law, the 1972 Act is not itself the originating source of that law. It is only the "conduit pipe" by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU Law an independent and overriding source of domestic law[20]. The 1972 Act, therefore, has a constitutional character. Following the 1972 Act coming into force, the normal rule is that any domestic legislation must be consistent with the EU Law; such EU Law has primacy as a matter of domestic law and legislation inconsistent with the EU Law is ineffective. However, legislation that alters the *"domestic constitutional status of EU institutions or of EU Law"* is not constrained by the need to be consistent with the EU Law. This is because of the principle of Parliamentary Sovereignty that is fundamental to the United Kingdom's constitutional arrangements and EU Law can only enjoy a status in domestic law which that principle allows. It will, therefore, have that status only for as long as the 1972 Act continues to apply and that is a matter for Parliament[21].

The Government's argument was that section 2(1) of the 1972 Act is ambulatory in that the wording that EU Law rights remedies etc. *"from time to time provided for by or under the treaties"* were *"to be given effect or used in the United Kingdom"* accommodated the possibility of Ministers withdrawing from the treaties without Parliamentary authority[22]. However, the majority considered there was a "vital difference" between changes in domestic law resulting from variations in the content of EU Law and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union[23]. The latter involves unilateral action by the relevant constitutional bodies, which effects a fundamental change in the constitutional arrangements of the United Kingdom[24]. The majority concluded that they could not accept a major change to UK constitutional arrangements can be achieved by Ministers alone and it must be affected by Parliamentary legislation[25].

[18] Ibid [60].
[19] Ibid [63].
[20] Ibid [65].
[21] Ibid [67].
[22] Ibid [75].
[23] Ibid [78].
[24] Ibid.
[25] Ibid [82].

C *The Dissenting View*

The leading judgment for the three dissentients was given by Lord Reed. He said that there is no legal requirement for the Crown to seek Parliamentary authorisation because the exercise of the power, except to the extent that Parliament, is provided by statute. Since there is no statute which requires the decision under Article 50(1) enabling withdrawal to be taken by Parliament, it follows that the decision can lawfully be taken by the Crown in the exercise of the prerogative. There is, therefore, no legal requirement for an Act of Parliament to authorise the giving of notification of withdrawal under Article 50(2)[26].

He accepted the importance in constitutional law of the principle of Parliamentary supremacy over domestic law, but that principle did not require that Parliament must enact an Act of Parliament before the United Kingdom can leave the European Union. That is because the effect which Parliament has given to EU Laws in domestic laws under the 1972 Act is inherently conditional on the application of the EU treaties to the UK and therefore the UK's membership of the EU. The 1972 Act imposed no requirement and manifested no intention in respect of the UK's membership of the EU. It did not, affect the Crown's exercise of prerogative powers in respect of UK membership. The effect of the EU law in the UK is entirely dependent on the 1972 Act[27].

Referring to the words *"from time to time"* appearing in section 2(1), Lord Reed said that the rights, powers, liabilities, obligations, and restrictions arising under the EU treaties – as well as the remedies and procedures provided for under those treaties – alter from time to time. This demonstrates that Parliament has recognised that rights given effect under the 1972 Act may be added to, altered, or revoked without the necessity of a further act of Parliament. As to the majority of the Court drawing a distinction described as *"a vital difference"* between changes in domestic law resulting from variations in the content of EU law and changes resulting from withdrawal by the UK from the European Union, there is no basis in the language of the 1972 Act for drawing any such distinction[28].

The differences between the majority and minority views turned largely upon differing statutory constructions of the relevant legislation. However, there was general consensus about the nature and history of prerogative powers that the judgment discussed.

D *The History of the Royal Prerogative*

Unlike Australia, the UK Constitution is unwritten and has been described as *"the most flexible polity in existence"*[29].

Originally, sovereignty was concentrated in the Crown that largely exercised all the powers of the State. Prerogative powers were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th Century the great

[26] Ibid [161].
[27] Ibid[177].
[28] Ibid[186]-[187].
[29] Albert Dicey, '*Introduction to the Study of the Law of the Constitution*'(8th Edition) (1915), 87.

majority of what had previously been prerogative powers, at least with respect to domestic matters, had become vested in the three principal organs of the State, the legislature (the two Houses of Parliament), the executive (Ministers and the Government more generally) and the judiciary (the Judges). Statutes such as the Bill of Rights (1689), the Act of Settlements (1701) in England and Wales, the Claim of Right Act 1689 in Scotland, and various Acts of Union in 1706 to 1707 formally recognised the independence of the judiciary. Under the preceding legal provisions, the role of the judiciary was to uphold and further the rule of law[30]

Sir Edward Coke CJ said that:

> *"The King by his proclamation or in other ways cannot change any part of the Common Law, or Statute Law, or the customs of the realm"*[31].

It had become established by the Bill of Rights of 1689 that the pretended power of suspending or dispensing with laws by the monarch was illegal[32]. The Crown's administrative powers are now exercised by the executive being the Ministers who are answerable to the UK Parliament. However, the exercise of those powers must be compatible with legislation or the Common Law. The King in Council and any branch of the executive cannot prescribe or alter the law to be administered by Courts of Law and to do so is *"out of harmony with the principles of our constitution"*[33]. It is true that Ministers can make laws by issuing regulations, known as secondary or delegated legislation, but they can only do so if authorised by statute.

V THE SCOPE OF PREROGATIVE POWERS

Today, the royal prerogative encompasses a residue of powers that remain vested in the Crown, exercisable by Ministers, provided that the exercise is consistent with Parliamentary legislation. It is *"only available for a case not covered by statute"*. Professor Wade described it as:

> *"The residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot effect the rights of subjects) and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war"*[34].

Since the 17th Century, the prerogative has not empowered the Crown to change English Common or Statute Law. A prerogative power, however well established, may

[30] *(R)(on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, 41- 42.

[31] *The Case of Proclamations* (1610) 12, 74.

[32] *(R) (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, 44.

[33] As per Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77, 90.

[34] Professor HWR Wade: *"Administrative Law"* (1st Edition) (1961), p. 13 and at paragraph [47] of *(R) (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.

be curtailed or abrogated by statute. There are important areas of governmental activities even today essential to the effect of operation of the State, which are not covered by statute such as the conduct of diplomacy in war; these are viewed as best reserved to Ministers[35].

Although prerogative powers cannot change the domestic law, they may have domestic legal consequences. Firstly, where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others the Crown has a prerogative power to decide on the terms of service of its servants and it is inherent in that power that the Crown can alter those terms so as to remove rights, albeit such a power is susceptible to judicial review. The Crown also has a prerogative power to destroy property during times of war in the interest of national defence, although at Common Law compensation is payable. The exercise of such powers may affect individual rights, but it does not change the law because the law has always authorised the exercise of that power.[36]

A *The Constitutional Principles: Accountability to Parliament for Prerogative Exercise*

The most significant area is the conduct of foreign affairs, but as Lord Oliver said in JH *Rayner (Mincing Lane) Ltd v Department of Trade & Industry*:[37]

> *"As a matter of the Constitutional Law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."*

Since treaty-making is outside the purview of the Courts because it is made in the conduct of foreign affairs, which is the prerogative of the Crown, this may be regarded as a necessary corollary of Parliamentary sovereignty because:

> *"If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, Parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged"*.[38]

A further constitutional principle was pointed to by Lord Carnwath, who also dissented with Lord Reed. He did not see the choice as simply one between Parliamentary sovereignty, exercised through legislation, and the untrammelled exercise of the prerogative by the executive. No less fundamental to the constitution is the principle of Parliamentary accountability. The executive is accountable to Parliament for its exercise

[35] Ibid [48]-[50].
[36] Ibid at paragraph [52].
[37] [1990] 2 AC 418, 500.
[38] Campbell McLachlan, *'Foreign Relations Law'* (2014), 57, in *(R) (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5

of the prerogative, including its actions in international law. That account is made through ordinary Parliamentary procedures. Subject to specific statutory restrictions they were matters for Parliament alone. The Court may not inquire into the methods by which Parliament exercises control over the Executive, nor their adequacy[39].

VI THE SEQUEL TO THE FIRST BREXIT DECISION: THE WITHDRAWAL AGREEMENT

Parliament responded to the first decision by passing the European Union (Notification of Withdrawal) Act 2017 authorising the Prime Minister to give notice of withdrawal from the EU. Parliament then proceeded with some of the legislative steps needed to prepare the United Kingdom law for leaving the EU. The European Union (Withdrawal) Act 2018 defined the 'exit day' but this allowed for an extension by statutory instrument if needed. It repealed the European Communities Act 1972 which Act had provided for entry into the EU (at that time the EEC).

But Parliament did not now only legislate to trigger withdrawal from the European Union which was after all something which all the parties had promised in accordance with election manifestos. Crucially, section 13 of the 2018 Act now required parliamentary approval of the terms of any withdrawal agreement reached by the Ministers with the European Union. The machinery for leaving the European Union in Article 50 of the Treaty on European Union requires that the EU must negotiate and conclude an agreement with the member state "*setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union*". The European Union Treaty ceases to apply to that state when the withdrawal agreement comes into force or failing that two years after the notification unless the European Council unanimously agrees to extend that period.

A withdrawal agreement with the European Union by the Ministers was concluded on the 25th of November 2018 but this agreement was rejected by the House of Commons three times.

Following the voting down of the withdrawal agreement there was a change of Prime Minister with Mr Boris Johnson being chosen by the Conservative Party. He had been the leading light contending that Britain should leave the EU. However, a majority of the House of Commons would not support withdrawal from the EU without an agreement approved by Parliament and so, the European Union (Withdrawal) Act 2019 was passed, requiring the Prime Minister to seek an extension of three months from the EU if no withdrawal agreement had been approved by Parliament.

VII THE PROROGUING OF PARLIAMENT

On the 28th of August 2019, members of the Privy Council attended a meeting of the Council held by the Queen at Balmoral Castle and an order in council was made that Parliament be prorogued on a day no later than the 14th of October 2019. After this, Parliament would reconvene for the Queens speech which was to set out the governments

[39] Ibid [249].

legislative program. In approving the prorogation, Her Majesty was acting on advice of the Prime Minister who saw no merit in extending the deliberations of a Parliament. This is because the Parliament was now largely hostile to the United Kingdom leaving the EU without a withdrawal agreement to their liking. Some members were now calling for a second referendum to review the 2016 result.

As it happened, the Prime Minister and his Ministers did get a modified withdrawal agreement with the EU but the government no longer commanded enough parliamentary support to get it approved. Accordingly, in an endeavour to secure an outright majority to pass his modified withdrawal agreement, the Prime Minister called an election for the 12th of December 2019. The result of this election has now enabled his conservative government to leave the EU on the 31st January 2020 with the modified withdrawal agreement. The framework for the future relationship with the EU is intended by the UK government is to be finalised by the 31st December 2020.

VIII THE SECOND BREXIT CASE[40]

As soon as the prorogation was announced, Mrs Gina Miller, who mounted the first Brexit challenge, launched proceedings in the High Court in England and Wales. Miller was seeking a declaration that the Prime Minister's advice to Her Majesty to prorogue was unlawful. Those proceedings were heard by a divisional court, comprising the Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division. The preceding judges dismissed the claim on the ground that the issue was not justiciable. Similar proceedings were mounted in the Scottish Court of Sessions where initially the government succeeded but the Inner House, on appeal, held that the advice given to Her Majesty was justiciable, that it was motivated by the improper purpose of stymying parliamentary scrutiny of the Executive, and that the advice and the prorogation which followed it were unlawful and thus null and of no effect. There was then an appeal of both decisions to the Supreme Court which again sat all eleven members.

A *The Principles in Question*

Firstly, the Supreme Court said that the power to order prorogation of Parliament is a prerogative power being a power recognised by the common law and exercised by the sovereign in person acting on advice in accordance with modern constitutional practice.[41] Secondly, whilst the Court cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians or arises from a matter of political controversy has never been sufficient reason for the courts to refuse to consider it.[42] For this, they gave the example of the Case of Proclamations[43]. This example outlined that an attempt to alter the law of the land by the use of the Crown's prerogative was unlawful. The Court there holding that 'the king hath no prerogative, but that which the law of the land allows him' indicated that the limits of prerogative powers were set by law and were determined by the courts. Another example was *Entick v Carrington*

[40] *R (On the Application of Miller) v The Prime Minister & Others* 2019 UKSC 41.
[41] Ibid [30].
[42] Ibid [31].
[43] (1611) 12 Co Rep 74.

(1765) [44] where the Court found that the Secretary of State could not order searches of private property without authority conferred by an act of parliament or the common law.[45]

Thirdly, the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play. This is so because the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Further, a court has a duty to give effect to the law irrespective of the Minister's political accountability to Parliament. Ministerial responsibility is no substitute for judicial review.[46] Fourthly, if the issue before the court is justiciable deciding it will not offend against the separation of powers by ensuring the prorogation power is not used unlawfully. Indeed, the court will be giving effect to the separation of powers by ensuring the prorogation power is not used unlawfully.[47]

B *Whether These Issues are Justiciable*

The Court saw the first issue as whether a prerogative power exists and its extent. Secondly, if accepted that a prerogative power existed and it has been exercised within its limits, the question then was whether a purported exercise of power was challengeable in the courts based on one or more of the recognised grounds of judicial review. In the *Council of Civil Service Unions v Minister for the Civil Service* (1985)[48]*,* the dissolution of parliament was seen by Lord Roskill as one of several powers whose exercise was – in his view – non-justiciable. It was important to appreciate that this argument advanced by the Government that prorogation is analogous with dissolution and is, therefore, an excluded category, only arises if the issue in the proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits rather than as one concerning the lawful limits of the power and whether they have been exceeded. No question of justiciability can arise in relation to whether the law recognises the existence of a prerogative power. It further cannot arise in relation to its legal limits. These are, by definition, questions of law for the courts.[49]

C *Deciding the Limits of Prerogative Power*

Whilst it is relatively straightforward to determine the limits of a statutory power, determining the limits of a prerogative power which is not constituted in any document is less straightforward. Nevertheless, every prerogative power has its limits and it is the function of the court to determine where they lie. The common law recognises prerogative power and that power must be compatible with common law principle that may illuminate where its boundaries lie.[50]

[44] (1765) 19 State Trials 1029.
[45] Ibid [32].
[46] Ibid [32].
[47] Ibid [34].
[48] [1985] AC 374 Lord Roskill mentioned at page 418.
[49] Ibid [36].
[50] Ibid [38].

Constitutional principles may be developed by the common law. For example, that justice must be administered in public and the principle of the separation of powers must exist. The principle may extend to the application of governmental powers including prerogative powers. For example, the Executive cannot exercise prerogative powers to deprive people of their property without the payment of compensation.[51]

D *Sovereignty of Parliament is a Foundational Principle*

The Court said that the sovereignty of Parliament would be undermined as the foundational principle of our constitution if the Executive could use the prerogative to prevent Parliament from exercising its legislative authority. That would be the position if there was no legal limit on the power to prorogue Parliament.[52] The longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government.[53] A prerogative power is, therefore, limited by statute and the common law and will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of parliament to carry out its constitutional functions as the legislature and as the body responsible for the supervision of the Executive.[54]

E *The Prime Minister's Explanation for Prorogation*

The Government argued that there were no circumstances whatsoever in which the Court could review a decision to prorogue Parliament.[55] However, it is a concomitant of Parliamentary sovereignty that the length of prorogation is not unlimited.[56] The question then is whether the Prime Minister's explanation for advising the Parliament should be prorogued was a reasonable justification.

The Government argued that to declare the prorogation null and of no effect is contrary to Article 9 of the Bill of Rights of 1688 that states "the freedom of speech in debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". It is a principal role of the courts to interpret Acts of Parliament.

However, in *R v Chytor* (2010)[57] a prosecution of several members of Parliament for allegedly making false expenses claims was resisted. The grounds were that these claims existed as 'proceedings in Parliament' that ought not to be 'impeached or questioned' in any court. It was held unanimously by nine justices that MP's expenses were not 'proceedings in Parliament'. The case established that it is for the Court and not for Parliament to determine the scope of parliamentary privilege, whether under Article 9 of the Bill of Rights or matters within the exclusive cognisance of Parliament. The principle in Article 9 is directed to freedom of speech and debate. The prorogation

[51] Ibid [40].
[52] Ibid [42].
[53] Ibid [48].
[54] Ibid [50].
[55] Ibid [43].
[56] Ibid [44].
[57] (2010) UKSC 52.

itself takes place in the presence of members of both houses but it cannot be sensibly described as a 'proceeding in Parliament'. It is not a decision of either house but, rather, it is something that is imposed upon members of Parliament from outside[58]. The court was therefore not precluded by Article 9 or by any wider parliamentary privilege from considering the validity of the prorogation itself.

The Prime Minister did not submit any evidence to the Court about what passed between him and the Queen when advising her to prorogue. However, the Court had three documents leading up to the advice, one of which contained the Prime Minister's hand-written comments on a memorandum that said 'the whole September session is a rigmarole introduced (words redacted) to show the public that MP's were earning their crust, so I don't see anything especially shocking about this prorogation.'[59] The words redacted above were 'by girly swot Cameron',[60] a reference to the former Prime Minister David Cameron who had been at Eton School with Johnson.

The minutes of a Cabinet meeting held by conference call on the 27th of August, after the advice had been given, asserted that prorogation had not been driven by Brexit considerations. It had been portrayed as a means to prevent MP's intervening to prevent the United Kingdom's departure from the EU due on the 31st of October 2019 but it was contended that was not so. A Queen's speech was to be delivered on the 14th of October and the Prime Minister sent a letter to MP's setting out '…an ambitious and domestic legislative agenda for the renewal of our country after Brexit.'[61]

F *The Legal Test of Unlawfulness*

However, the longer Parliament stands prorogued the greater the risk that responsible Government may be replaced by unaccountable Government.[62] The relevant limit in this case upon the power to prorogue can be expressed thus: that the decision to prorogue Parliament will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its Constitutional functions as a legislature and as the body responsible for the supervision of the Executive.[63]

This was not a normal prorogation in the run up to a Queen's speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and the exit date from the EU set for the 31st of October 2019.[64] Sometimes, this interruption may not matter but where a fundamental change was due to take place in the UK constitution on the 31st of October 2019 it was important[65]

There was no reason given for closing Parliament for five weeks on the pretext that

[58] Ibid [68].
[59] Ibid [18].
[60] Stephen Sedley, 'In Court'(2019) *London Review of Books* 16.
[61] Ibid [21].
[62] Ibid [48].
[63] Ibid [50].
[64] Ibid [56].
[65] Ibid [57].

this time was needed for preparation of the Queen's speech setting out the government's program. The unchallenged evidence of Sir John Major, a former Prime Minister, that 4-6 days is sufficient for that purpose was accepted.[66] It was impossible to conclude that there was any reason to advice a prorogation of five weeks.[67]

It was found therefore that the advice was unlawful because it was outside the powers of the Prime Minister to give it and therefore it was null and of no effect.

G *The Political Consequences*

The two decisions of the Supreme Court have had political consequences well beyond the arcane points of law which the Court decided. Had the dissenting view of the three Judges succeeded in the first Brexit case, Theresa May's government would have been able to implement the withdrawal agreement with the EU without recourse to Parliament for approval of that agreement. Accordingly, the United Kingdom would have left the EU long before now.

It is because in the years following, the ousting of the Stuarts, the Crown ceased to govern through the Ministers. Thus, Ministers began to govern through the crown that an issue like the prorogation crisis addressed in the second Brexit case has been able to arise.[68]

The Bill of Rights 1688 – 89 created today's constitutional monarchy, leaving in existence a range of prerogative powers that has been significantly reduced in their scope by the recent decisions. The first Brexit case affirmed the established proposition that prerogative powers do not allow for extending or altering laws which confer rights upon individuals where those are enjoyed under domestic law. Although the executive may make treaties under international law in exercise of the prerogative those powers have no effect upon the domestic law unless parliament legislates to adopt the treaty terms as part of the domestic law.

The two Brexit cases demonstrated that Ministers may only govern as long as they have the confidence of parliament; that Ministers have an accountability to parliament for their conduct of both foreign and domestic policy; that an executive becomes rudderless where it does not have parliamentary support to pass legislation; and that the courts may hold an executive government to account for an unlawful exercise of its prerogative powers.

It must be now doubted whether even the limited prerogative powers set out by Professor Wade and cited in the first Brexit case or those described by Lord Roskill in the Council of Civil Service Union case alluded to in the second Brexit case, are non-justiciable. Lord Roskill saw the prerogative powers free from challenge as the making of treaties; the defence of the realm; the prerogative of mercy; the grant of honours; the appointment of ministers; and the dissolution of government.[69]

The second Brexit case indicates that the judicial role to patrol both the boundaries

[66] Ibid [59].
[67] Ibid [61].
[68] William Anson, '*The Law and Custom of the Constitution*' (2019) LRB 16.
[69] 1985 AC 374 Lord Roskill , 418.

of political lawfulness and to scrutinise by judicial review political actions has been enlarged. This could be short-lived as Borris Johnson's new Attorney General is reported to be seeking more control over the judiciary. However, the second Brexit case recognised that Constitutional principles may be developed by the common law and that this would include recognising the separation of powers. Judicial review remains a constitutionally recognised judicial obligation.

IX MR DONALD TRUMP'S PREROGATIVE POWERS

The US President's prerogative powers are given under Article II s1 of the US Constitution. In the recent unsuccessful impeachment of President Trump by the Democrats, the two articles of impeachment alleged abuse of office and obstruction of Congress. The President's lawyers contended that neither the two articles constituted grounds for impeachment under the US Constitution which limited impeachment to "treason, bribery, or other high crimes and misdemeanours". The President's case was that his discussions with the Ukrainian President over foreign aid supplied by the United States accorded with his constitutional powers and did not fall within the definition for impeachment whilst the Democrats maintained that the definition included abuse or violation of public trust which did not necessarily amount to criminal misconduct.[70]

As Sir Henry Maine points out, under the US Constitution, the powers of the President reflected many of the prerogative powers of the Monarch George III. Maine added that the US constitution was a modified version of the British Constitution in existence between 1760 and 1787[71]. He explains that just as George III refused to submit to his cabinet's authority, so the framers of the US Constitution:

> *"gave the whole of executive government to the President and they did not permit his ministers to have a seat or speak in either branch of the legislature. They limit his power and theirs, not however by any contrivance known to modern English constitutionalism but by making the office of President terminable at intervals of four years. Later the British King could not make treaties or even war save through the executive acts of his or her ministers, but the American President has retained the significant prerogative powers which existed in those earlier times"*[72].

Unlike in the United States, the Brexit cases asserted the sovereignty of Parliament and placed severe limits upon the scope of executive prerogative action. That said, prerogative powers continue to play a vital role in quashing intractable political controversies such as when Sir John Kerr dismissed the Whitlam Ministry in 1975 and Ratu Sir George Cakabou installed a new ministry in in Fiji in 1979.

[70] Alexander Hamilton, 'US Judiciary Committee 1974 "Constitutional Grounds for Presidential Impeachment' (2019), *The Federalist*, 65.

[71] Henry Maine, *Popular Government: four essays: I. Prospects of popular government; II. Nature of democracy; III. Age of progress; IV Constitution of the United States* (J Murray, 1909) 253.

[33] Ibid [213] – [214].

[72] Ibid.